IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ANDERSON/GREENWOOD DIVISION

John S. Bryan, Plaintiff,) Case No. 8:10-cv-00793-JMC-JDA
V.) REPORT AND RECOMMENDATION) OF MAGISTRATE JUDGE
Fulmer Helmets Inc., Defendant.)
)

Plaintiff is proceeding pro se and brought this wrongful death and survival action on March 19, 2010 in the Greenwood County Court of Common Pleas. [Doc. 1-1.] Defendant removed the action to this Court on March 30, 2010. [Doc. 1.] On March 21, 2011, Defendant filed a motion to dismiss. [Doc. 32.] By Order of this Court filed March 22, 2011, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff was advised of the summary judgment/dismissal procedure and the possible consequences if he failed to respond adequately. [Doc. 33.] Despite this explanation, Plaintiff did not respond to the motion. Because Plaintiff is proceeding pro se, the Court filed an Order on April 28, 2011, giving Plaintiff through May 20, 2011, to respond to the motion to dismiss. [Doc. 36.] Plaintiff was specifically advised that if he failed to file a response, this action would be subject to dismissal for failure to prosecute. [*Id.*] Despite this explanation, Plaintiff elected not to respond.

"The Federal Rules of Civil Procedure recognize that courts must have the authority to control litigation before them, and this authority includes the power to order dismissal of an action for failure to comply with court orders." *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir. 1989) (citing Fed. R. Civ. P. 41(b)). "Federal courts possess an inherent authority to dismiss cases with prejudice *sua sponte*." *Gantt v. Md. Div. of Corr.*, 894 F. Supp. 226,

229 (D. Md. 1995) (citing *Link v. Wabash R. Co.*, 370 U.S. 626 (1962); *White v. Raymark Indust., Inc.*, 783 F.2d 1175 (4th Cir. 1986); *Zaczek v. Fauquier Cnty., Va.*, 764 F. Supp. 1071, 1074 (E.D. Va.1991)).

The Fourth Circuit, in *Davis v. Williams*, recognizing that dismissal with prejudice is a harsh sanction that should not be invoked lightly, set forth four factors for determining whether Rule 41(b) dismissal is appropriate:

- (1) the degree of personal responsibility on the part of the plaintiff;
- (2) the amount of prejudice to the defendant caused by the delay;
- (3) the presence or absence of a drawn out history of deliberately proceeding in a dilatory fashion; and
- (4) the effectiveness of sanctions less drastic than dismissal.

588 F.2d 69, 70 (4th Cir. 1978) (citing *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976)). Subsequently, however, the Fourth Circuit noted that "the four factors . . . are not a rigid four-pronged test," and whether to dismiss depends on the particular circumstances of the case. *Ballard*, 882 F.2d at 95. For example, in *Ballard*, the court reasoned that "the Magistrate's explicit warning that a recommendation of dismissal would result from failure to obey his order is a critical fact that distinguishes this case from those cited by appellant. . . . In view of the warning, the district court had little alternative to dismissal. Any other course would have placed the credibility of the court in doubt and invited abuse." *Id.* at 95–96.

As Plaintiff is proceeding pro se, he is personally responsible for his failure to file a response. The case has been pending almost two years, and Plaintiff has now had over

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ten months to file a response to the motion to dismiss. The Court has warned Plaintiff that

the case would be dismissed pursuant to Rule 41(b) if Plaintiff failed to file a response.

[Doc. 36.] Despite this explanation, Plaintiff has elected not to respond. Because Plaintiff

has already ignored deadlines set by the Court, sanctions less drastic than dismissal would

not be effective.

Wherefore, based upon the foregoing, the Court recommends that the case be

DISMISSED pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

February 1, 2012 Greenville, South Carolina